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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 113, 114.

113 114

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

PACIFIC COAST WHOLESALERS' ASSOCIATION, *et al.*,

Appellees.

On Appeal From the United States District Court for the Southern District of California.

Brief on Behalf of Appellees: Pacific Coast Wholesalers' Association and Elmer J. Jensen, Percy T. Lyon, Ira C. Lambert, G. A. Olson and Sol Smith.

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OPINION BELOW.

The opinion of the District Court for the Southern District of California [R. 49] is reported in 81 Fed. Supp. 991. The reports of the Interstate Commerce Commissions [R. 12, 23] appear in 264 I. C. C. 134 and 269 I. C. C. 504.

JURISDICTION.

The final decree of the three-judge District Court was entered on February 18, 1949 [R. 61]. The petition for appeal was presented and allowed on April 12, 1949 [R. 63, 66]. The jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101(b), and 2325. Probable jurisdiction was noted on October 10, 1949 [R. 772].

QUESTIONS PRESENTED.

As stated by the court below:

> "So the precise question here is whether the facts found by the Commission show respondent (appellee) Pacific Coast Wholesalers' Association to be a 'freight forwarder' within the meaning of Section 402 of the Interstate Commerce Act (49 U. S. C., Section 1002)." [R. 54.]

It was held by the court below that "the conclusions and requirements of the Interstate Commerce Commission predicated upon the Report of December 18, 1947 [269 I. C. C. 504] have no rational basis and must be set aside." [R. 56.]

Accordingly, the following questions are now presented on this appeal.

1. Whether the Commission's findings of fact support the conclusion that: "The Association's service in connection with shipments from non-member-consignors to member-consignees and their customers, of goods sold on a f.o.b.-destination or delivered price basis is not a service to the Association's members." [R. 35.]

2. Whether the Commission's findings support the conclusion that "the Association's service in connection with shipments from non-member-consignors to member-consignees and their customers of goods sold on a f.o.b.-destination or delivered price basis * * * is not performed on a non-profit basis within the meaning of Section 402(c)(1) of the Act." [R. 36.]

3. Whether the Commission's findings support the conclusion that the Association holds itself out to the general public to transport or provide transportation of property for compensation, within the meaning of Section 402(a)(5) of the Interstate Commerce Act.

STATUTE INVOLVED.

Section 402 of Part IV of the Interstate Commerce Act, 56 Stat. 284, 284, 49 U. S. C. 1002 provides in part:

(a) For the purposes of this part—

* * * * * * * *

(5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the Transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

* * * * * * * *

(7) The term "service subject to this part" means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this part to perform or provide;

* * * * * * * *

(b) The provisions of this part shall not apply (1) to service performed by or under the direction of a cooperative association, as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, or (2) where the property with respect to which service is performed consists of ordinary livestock, fish (including shellfish), agricultural commodities (not including Manufactured products thereof), or used household goods, if the person performing such service engages in service subject to this part with respect to not more than one of the classifications of property above specified.

(c) The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed.

Section 403, 49 U. S. C. 1003, provides in part:

(a) It shall be the duty of the Commission to administer the provisions of this part, and to that end it shall have the authority to make and amend such rules and regulations and to issue such orders as may be necessary to carry out its provisions.

* * * * * * * *

(f) The Commission may investigate, either upon complaint or upon its own initiative, whether any freight forwarder has failed to comply with any provision of this part or with any order, rule, regulation, or requirement issued or established pursuant thereto, and, after notice and hearing, take appropriate action to compel compliance therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for action on its part, it may dismiss such complaint.

Section 410, 49 U. S. C. 1010, provides in part:

(a) No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such services; * * *

STATEMENT OF THE CASE.

1. Antecedent Proceedings.

December 6, 1944, the Interstate Commerce Commission, in response to an unverified complaint filed by the Freight Forwarders Institute, instituted a proceeding of investigation and inquiry (*ex parte* 160) to determine whether the activities of Pacific Coast Wholesalers' Association, its directors, officers and managerial employees, were "those of a freight forwarder" within the meaning of that term as defined by Section 402 of Part IV of the Interstate Commerce Act. After hearings, receipt of evidence, briefs and oral argument, the Commission, through Division 4, issued its Report, dated November 26, 1945 (264 I. C. C. 134) [R. 12], wherein it found the operations of respondents to be within the provisions of the exemption provided by Section 402(c) of Part IV of the Interstate Commerce Act.

Thereafter, upon petition of the Freight Forwarders Institute the proceeding was re-opened, further hearings held, evidence received, briefs and oral argument submitted, following which a further Report was rendered December 18, 1947 (269 I. C. C. 504) [R. 23]. By this latter report the Commission reaffirmed the findings and conclusions of the prior report with respect to all phases of the activities of the Association, its directors, officers and employees, except those pertaining to less carload shipments of goods purchased by members of the Association on f.o.b.-destination or price delivered basis. These shipments, like all others destined to members of the Association, were shipped pursuant to instructions given by the member-purchasers to the non-member sellers and delivered to the Association at Chicago, where they were consolidated with other shipments of members' freight

into carloads, which were then shipped by the Association to Pacific Coast points for ultimate distribution to the members.

As to such shipments of goods purchased f.o.b.-destination or on a price delivered basis, the Commission concluded that the service of the Association was rendered to the non-member sellers rather than the member purchasers, and that any saving accomplished through the consolidation and movement of such shipments in carloads constituted a "profit" to the Association and its members, contrary to the exemption provision of Section 402(c) of the Interstate Commerce Act. The Commission further held that in handling these shipments the Association "held itself out to the general public to furnish transportation service," thereby assuming the status of a "freight forwarder" as defined by Section 402(a)(5) of the Interstate Commerce Act. Since the Association had not obtained a permit to operate as a freight forwarder the Commission held that a continuance of its said operations would be in violation of Section 410(a) of the Act and, therefore, unlawful. Accordingly, the respondents were directed to discontinue the operations found to be unlawful and to notify the Commission in writing, under oath, that such operations were discontinued[1] [R. 36].

The present action was brought by appellees against the United States to have the Commission's order set aside and its enforcement enjoined [R. 1]. Appellants, Interstate Commerce Commission and Freight Forward-

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[1]The Commission's Report also specified the effective dates on or before which the discontinuance and notice thereof should be accomplished. By supplemental orders these effective dates were thereafter postponed and remained inoperative until set aside by the decree of the lower court herein.

ers Institute, intervened [R. 38, 39]. The instant appeals were taken by the United States and the Interstate Commerce Commission (113) and by Freight Forwarders Institute (114) from the decree of the District Court setting aside and enjoining the enforcement of the Commission's order [R. 61, 62].

The issue here presented is whether, on the findings of fact made by the Commission, there was a rational basis for its conclusion that the activities of appellees with respect to goods sold f.o.b.-destination or on a delivered price basis are those of a freight forwarder within the meaning of Section 402(a)(5) of the Interstate Commerce Act (49 U. S. C. 1002).

2. Factual Background.

The appellee Association was organized and existed as an unincorporated association of shippers from 1935 to 1943. It was then incorporated as a "non-profit corporation" pursuant to appropriate provisions of California law (Civil Code, Division First, Part IV, Title XII). The Association is not authorized to issue capital stock nor to earn or declare dividends. Membership, evidenced only by non-transferable certificates, is limited under the by-laws to fifty. At the close of hearings there were thirty-eight members, located or having branch establishments in one or more of five western states.

The activities of the Association are, and have been, confined to the consolidation at Chicago of less-carload freight shipments of property purchased by its members from various factories east of Chicago and the shipment of such property in consolidated carloads from Chicago to break-bulk points at Los Angeles and San Francisco, California; Phoenix, Arizona; Portland, Oregon; Seattle,

Spokane and Yakima, Washington; and Salt Lake City, Utah, from which points individual shipments are distributed to the members.

The Association consistently has refused to allow any property to be included in the consolidation which did not belong to a member.[2] All benefits in the nature of savings on freight charges from the use of carload rates have been distributed to the member or members whose property was consolidated. All other benefits derived from the activities of the Association, such as prompt and careful handling of members' shipments, maintenance of insurance coverage thereon, prosecution of loss and damage claims, and expediting the movement of shipments from origin to final destination, have accrued exclusively to the members.

The Association has no business relations or dealings on its own behalf with non-member consignors from whom

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[2]*Witness Kaylor* testified at Cleveland: "* * * we do know that unless we ship for members of the P. C. W. A. they will not accept shipments. We have on several occasions, but they have written us and said they will not accept shipments unless for members in good standing of the association." [R. 447.] * * *

"Our billing department could not find any means of transportation to the west coast at the time—everything was clogged up, and P. C. W. A. was very good on deliveries, and they (*sic*) attempted to pass them through on P. C. W. A. in hopes that they would go on through on schedule. However, they would not accept them due to the fact that the consignee was not a member of their organization." [R. 460, 461.]

"The nature of those instructions were that we ship P. C. W. A. only shipments that were to be consigned to members of the organization. * * * that is the only instruction we received (from P. C. W. A.)" [R. 457.]

Witness Novak also testified: "I am instructed by the P. C. W. A. who the consignees are that belong to the Association. We should ship via P. C. W. A. to only those that belong to the Association. * * * we have instructions in black and white who to ship to as those members of your association." [R. 467-468.]

the members purchase their property. It is designated as the consignee at Chicago pursuant to routing instructions given by its members to the non-member consignors.[3] Irrespective of whether the shipments are made "collect," "prepaid," or "freight-allowed"[4] the non-member consignors observe the routing requested by their customers and consign the shipments to the Association at Chicago.

Under the operating plan as described in the prior report, 264 I. C. C. 134, funds with which to carry on the activities of the Association are provided by "advances" made by the members to the Association on each shipment handled, in an amount equivalent to the published freight

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[3]The following representatives of non-member consignors testified that shipments were consigned to P. C. W. A. at Chicago only because of routing instructions given by their customers, members of P. C. W. A., who were the purchasers of the goods being shipped, and not by reason of any agreement or arrangement between P. C. W. A. and the non-member consignors; "Krips, R. 413-420; Reese, R. 421-2; Forrest, R. 427-8; Hunsberger, R. 436; Kaylor, R. 456; Novak, R. 464, 468; Schmetzer, R. 475-8; Wills, R. 480; Schmidt, R. 483; Harris, R. 501-2; Lange, R. 507, 512; McParland, R. 526, 531; Dickson, R. 539-540.

[4]The term "freight allowed" means simply that the seller of goods has agreed with the purchaser to allow a deduction from the list price in an amount specified in the contract of purchase to offset, in whole or in part, the amount which the seller expected and would be required to pay for transportation of the goods if he had shipped them for his own account from his place of business to that of the purchaser. Freight allowances are the result of individual bargains, and differ widely in different cases. They are variously designated as full freight allowances, freight allowances from or to designated basing points, freight allowances in a specified sum, freight allowances at a specified carrier rate, freight allowances with various restrictive conditions as to weight, quantity and type of commodity shipped, and other forms appropriate to the particular transaction. For example, a seller's price list filed herein as *Exhibit 37* (omitted in printing), contained the following terms which were read into the record: "We will allow freight not exceeding lowest tariff rate on shipments of Silencers and Installation Kits, provided total weight is 100 pounds or more." [R. 517.] See also, testimony by witnesses Hunsberger, R. 435, 436, and Pedder, R. 589-592.

forwarder, or lowest common carrier, rate, plus three per cent. Collection of these advances is accomplished through freight bills prepared by the Association while the consolidated carloads are in transit and presented to the member consignees for payment immediately upon delivery of the freight. With the money thus collected the Association pays the inbound freight charges on the less-carload shipments received at Chicago, rail freight on the consolidated carloads, delivery costs at destination, and all other expense items incidental to the operation. The remaining balance, if any, represents the "saving" which is accounted for and distributed to the members receiving the shipments. The savings, or loss, realized on each shipment is accounted for, and the member for whom the shipment was handled is credited or charged, as the case may be. In this way all savings are paid by the Association direct to the member entitled thereto. There is no distribution of savings on any other basis.

In the case of prepaid shipments received at Chicago, the Association, acting pursuant to instructions from its members, delivers its freight bills covering the "advances" due from its members who purchased the freight, to the consignor-sellers and collects from them the amount due from such members. Here again, there is no arrangement of any kind between the Association and the non-member consignor. The terms of the purchase contract under which the member acquires the property governs the action of the consignor-seller in paying the bill presented to him by P. C. W. A. upon the instruction of its member. In no case do these consignors seek or employ the services of the Association in consolidating the freight. All of the Association's service is performed upon instructions given by and for the exclusive benefit of its members.

3. The Commission's Findings.

In the proceedings before the Interstate Commerce Commission two reports were issued. In its first report dated November 26, 1945, 264 I. C. C. 134 [R. 12], the Commission made the following findings:

"The association was formed March 27, 1935, by a small group of dealers in automotive parts at Los Angeles, Calif., as a voluntary, unincorporated, nonprofit association, for the purpose of promoting the interest of its members, and to provide a means of assembling, consolidating, forwarding, and distributing freight for its members, on a nonprofit basis, and for the purpose of securing the benefits of carload, truckload, or other volume rates." [R. 13.]

"On September 27, 1943, the association was incorporated under the laws of the State of California. The purpose of the corporation, as stated in its articles of incorporation and by-laws, is substantially the same as that of its predecessor-in-interest." [R. 14.]

"Beginning in 1935 and continuing to the present time, the association has caused to be assembled, consolidated, transported, and distributed, freight from eastern origins consigned to its members * * *." [R. 15.]

"All shipments are picked up either by motor carriers or by rail carriers at various points in the East and transported in less than truckloads or less than carloads, in linehaul movement, to Chicago, Ill., and

are there delivered to the association's agent, The Transport Terminal Company, hereinafter called the Terminal Company." [R. 15, 16.]

"Members of the association instruct the shippers to bill the shipments to the Terminal Company at Chicago, with a notation on each package and on the bill of lading showing the name and address of the ultimate consignee." [R. 16.]

"The freight charges from the origin to Chicago are paid to the linehaul carriers by the Terminal Company for account of the association." [R. 16.]

"No freight is handled for non-members." [R. 17.]

"It has been established in this proceeding that the traffic handled is for members of the association, that the association was founded and has been operated, in good faith, for the purpose of effecting savings in freight charges for its members by securing the benefits of carload, truckload, or other volume rates." [R. 22.]

In its second report dated December 8, 1947, 269 I. C. C. 504 [R. 23], the Commission in effect approved and reaffirmed the foregoing findings contained in its first report. In this connection the Commission stated:

"To the extent disclosed by the evidence introduced in the original hearing, the association's organizations, its activities, and its methods of handling freight under assembling rates, of settling freight charges, and of distributing the so-called savings, are described in the prior report." [R. 25.]

Additional findings incorporated in the second report are as follows:

"All of the shipments involved are consigned from eastern origins to the association at Chicago upon instructions of the members, and are there consolidated in carloads and forwarded to destinations or breakbulk points and distributed to members of the association or to their customers in the destination areas." [R. 25.]

"On further hearing, 14 witnesses testified on behalf of representative non-member consignors[1] that their concerns customarily use the services of the association in making shipments to its members, and either prepay the freight charges or make allowances therefor. In the latter case, the consignee pays the freight charges but is allowed to deduct those charges from the invoice price of the goods.

"At destination the freight is delivered to the member consignees or to their non-member customers without additional charge. Thereafter the member is credited with the difference between the amount paid by the consignor, and the costs borne by the association for transportation, administration, handling, distribution, taxes, etc. No refunds are made to non-member consignors who paid the charges in the manner stated." [R. 27.]

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[1]Reference to the record shows that only 13 representatives of non-member consignors appeared as witnesses, viz., Krips [R. 407], Reese [R. 421], Forrest [R. 425], Hunsberger [R. 433], Kaylor [R. 446], Novak [R. 463], Schmetzer [R. 474], Wills [R. 478], Schmidt [R. 482], Harris [R. 491], Lange [R. 505], McParland [R. 525], and Dickson [R. 534].

"A relatively minor part is billed to customers of the members at the direction of the latter. All transactions relating to the purchase and sale of the customer goods are between the members and the consignors." [R. 27.]

It was also established by uncontroverted evidence, although not set forth in the Commission's findings, that all payments by non-member consignors were made pursuant to the terms of the contracts of sale whereby the member-consignees purchased from the non-member-consignors the goods comprising the shipments here involved. By these contracts and as one of the terms thereof affecting the price to be paid for the goods, provision was made for prepayment of the freight or for a "freight allowance," in a specified amount. In each instance the collection by the Association from the non-member-consignor (seller) was in accordance with the contract of purchase previously executed by its member consignee.[2]

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[2]Eleven of the thirteen representatives of the non-member consignors who appeared as witnesses testified to this effect. The other two were not interrogated and gave no testimony on the subject. Those who did so testify were: Krips [R. 409, 413, 414]; Reese [R. 422]; Forrest [R. 429-433]; Hunsberger [R. 435-437]; Kaylor [R. 457]; Novak [R. 467]; Wills [R. 480]; Schmidt [R. 488, 489]; Harris [R. 495]; Lange [R. 507, 512, 517, 521]; McParland [R. 527].

Similar testimony was given by the member consignees who were called as witnesses, viz.: Vinson [R. 558]; Lambert [R. 465]; Jensen [R. 575]; Ernst [R. 583]; Lyon [R. 587]; Pedder [R. 591-2].

SUMMARY OF ARGUMENT.

1. The Association in All of Its Activities Served Only Its Members.

The lower court correctly held that the Commission's findings of fact show conclusively that the Association acted as the agent of its members and not as the agent of non-member consignors. The Commission found that "All of the shipments involved are consigned * * * upon instructions of the members"; that the facilities of the Association were not available to non-member shippers unless arrangements for that purpose were made by members through instructions given to the Association and to the non-member consignors, and that the purpose and result of the transaction is not to benefit the shipper, but to secure for members the benefit of lower carload rates.

The term "service" implies performance responsive to employment and for the benefit of the employer. There is no evidence in the record and nothing in the Commission's findings to show that non-member consignors ever employed the Association or consigned shipments to it, otherwise than upon instructions from the members. All benefits derived from the consolidation of shipments at Chicago and the transportation thence westward under carload rates accrued exclusively to the members.

In reaching the conclusion that the Association served non-member-consignors rather than member-consignees, the Commission erroneously relied upon reasoning applied in reparation cases, which has no logical application to the present case, and failed to recognize that such conclusion is not supported by its own findings of fact.

2. The Activities of the Association Were Conducted on a "Non-profit Basis" Within the Meaning of This Phrase, as Used in Section 402(c) of the Interstate Commerce Act.

Section 402(c) exempts from freight forwarder regulations the activities of a group or association of shippers, "consolidating or distributing freight for themselves * * * on a non-profit basis, for the purpose of securing the benefit of * * * carload lots."

The Commission's report, although admitting the exemption to be applicable in the consolidation of less carload shipments of goods purchased by members of the Association, "freight collect," erroneously concluded that the exemption does not apply if the goods were purchased "f.o.b. destination" or upon "a delivered price basis." The error of the Commission's conclusion and its inconsistency with the findings of fact were pointedly indicated by the opinion of the court below, wherein it was stated that the determination of who bears the freight is a "matter of contract between the seller-consignor and the purchaser-consignee." [R. 25.]

The agreement on the part of a seller to prepay freight charges or to make a freight allowance gives rise to a correlative right on the part of the purchaser to receive the benefits thereof. This right to receive such benefits is something which he acquired and in a sense belongs to him by virtue of the contract of sale. It follows that any saving in transportation costs accomplished by the purchaser through his own association by consolidating his less carload shipments in his own pool cars likewise belongs to him. Such savings are realized on "a non-profit basis" within the meaning of Section 402(c).

3. The Association Did Not Hold Itself Out to the General Public to Transport or Provide Transportation of Property for Compensation.

The Commission's conclusion that the Association offered its services to the public is based upon the erroneous conclusion that in its operations in connection with goods sold f.o.b. destination or on a delivered price basis, it *served* the non-member-consignors rather than its member-consignees. Such conclusion has no rational support in the Commission's findings of fact, which show that the Association acted exclusively as the agent of its members and rendered no services to others except upon instructions given by its members.

ARGUMENT.

Foreword.

By way of preface to the argument, we desire respectfully to direct attention to certain basic facts which should be borne in mind throughout the consideration of the issues presented herein.

1. The respondent association was formed and has been operated for the sole purpose of arranging for the consolidation, transportation, and delivery of freight *comprising goods purchased by and shipped to its members.*

2. All goods purchased by and shipped to members were delivered to the Association at Chicago *pursuant to instructions given by Members to the consignor-sellers* from whom the goods were purchased.

3. The Association, as the agent of its members, took delivery at Chicago of all shipments which the members elected to consolidate in their own pool cars for shipment from Chicago to Pacific Coast points.

4. Payment and disposition of freight charges as between the consignor-sellers and consignee-purchasers were controlled by the terms of the contract under which the goods were acquired.

5. All savings in transportation costs realized through the operations of the Association *were distributed exclusively to the members directly benefited,* on the basis of each shipment included in the consolidation.

6. The Association consistently refused to accept for consolidation or render any service in connection with shipments of goods not purchased by its members.

7. All dealings of the Association with non-member consignors, carriers, and all others have been undertaken and performed *only on behalf of its members and pursuant to instructions given by such members.*

I.

The Report of the Interstate Commerce Commission Erroneously Finds and Concludes With Respect to Shipments of Goods Purchased by Members of the Association, f.o.b. Destination or on a Delivered Price Basis, That the Association Renders Services for Hire to Non-Member Sellers of Such Goods.

In its consideration of the operations of the Association, with respect to shipments of goods purchased by its members f.o.b. destination or on a delivered price basis, the Commission erroneously proceeded upon the assumption that the same reasoning should be applied as in reparation cases, where excessive freight charges had been collected by a carrier which consignor sought to recover. We respectfully submit that the reasoning followed in reparation cases has no application here.

The issues in a reparation case are (1) whether a wrong has been committed by a carrier in collecting excessive charges; and (2) who is entitled to sue for recovery of the excess wrongfully collected. In resolving these issues, it has been settled that the party who pays the freight charge in the first instance has suffered the injury and the court will not look beyond the first step to discover whether

this injury was ultimately passed on or compensated by another.

Adams v. Mills, 286 U. S. 297, 407;

South Pacific Co. v. Darnell-Taenzer Lbr. Co., 245 U. S. 531;

Louisville and R. R. v. Sheffield Steel & Iron Co., 269 U. S. 217.

The present case is one of investigation and inquiry. No question of tort, or right to sue, is involved. The question is whether the operations of the Association, viewed in the light of all facts and circumstances, constituted those of a freight forwarder. Involved with this issue is the question whether the service of the Association is performed for its members or for non-members consignors. The Commission, by relying solely on the rule established in reparation cases excluded consideration of uncontroverted evidence, reflected by its own findings of fact, showing the services to have been rendered exclusively to the members and for their benefit. Had such evidence and finding been given proper consideration, the Commission would necessarily have concluded: The Association served only its members in all its activities, including those pertaining to goods purchased by its members f.o.b. destination or on a delivered price basis.

The lower court correctly analyzed the Commission's findings and their true significance with respect to the proper conclusions as follows:

"Here the determinative inquiry is not as to agency as between consignor-seller and consignee-member

(*cf.* Adams v. Mills, 286 U. S. 397, 406-407 (1932), but as to the agency relationship between both or either of them and the association. And the facts found by the Commission admit of but one conclusion as to this: That the association at all times acts solely at the request, and under the direction and for the account and benefit, of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.

"The existence of this agency is implicit in the findings of the Commission. The report states that 'All of the shipments involved are consigned * * * upon instructions of the members' of the association. Admittedly, the facilities of the association are not available to a non-member shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent." [R. 55, 56.]

II.

The Association's Service in Connection With Shipments From Non-Member Consignors to Member Consignees, and Their Customers, of Goods Sold f.o.b. Destination or on a Delivered Price Basis, Was Performed on a "Non-Profit Basis" Within the Meaning of Section 402(c) of the Interstate Commerce Act.

Section 402(c) of the Interstate Commerce Act provides that the provisions for the regulation of freight forwarders "shall not be construed to apply to the operations of a shipper, or group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a non-profit basis for the purpose of securing the benefits of carload, truck load, or other volume rates * * *."

It is to be observed that the exemption from regulation as a freight forwarder extends to a shipper, or group or association of shippers under the following conditions:

1. Their activities must be confined to "consolidating or distributing freight *for themselves or for the members* thereof."

2. The purpose of consolidating and distributing freight must be that of "securing the benefits of carload, truckload, or other volume rates."

Obviously, this means securing benefits for themselves as a direct result from the use of carload, truckload or other volume rates, in lieu of the higher less carload rates which would otherwise apply to individual shipments included in the consolidation.

3. The operation of consolidating and distributing the freight must be conducted "on a non-profit basis."

This clearly refers to profit which might be realized from the operation of the Association if the service of consolidation were rendered for the benefit of non-members, and which would be available for distribution in the form of dividends on the basis of stock ownership or investment in the enterprise rather than as a refund to the members of savings realized on their individual shipments. Otherwise, the very purpose of the phrase "to secure the benefits of carload rates" would be nullified.

There is no ambiguity, conflict in terms, or reasonable doubt, as to the meaning of the language used in stating the conditions under which the exemption provisions of Section 402(c) shall apply. Reference to congressional debates or proceedings of congressional committees is therefore unnecessary and inappropriate.

> "Committee reports and explanatory statements of members of Congress in charge, made in presenting a bill for passage, while a legislative aid to the interpretation of a statute when its language is doubtful or obscure, cannot control such interpretation when, taking the act as a whole, the effect of the language used is clear to the court. Such aids are only admissible to solve doubt, and not to create it."
>
> *Railroad Commission v. Chi., B & Q. R. R. Co.*, 257 U. S. 563, 42 Sup. Ct. Rep. 232.

> "The meaning of the interstate commerce act of February 4, 1887 (24 Stat. at L. 379) cannot be determined from statements used in the debates in Congress, but must be interpreted by its own terms."
>
> *Omaha & C. B. Street R. Co. v. I. C. C.*, 230 U. S. 324, 33 Sup. Ct. Rep. 890.

"* * * Debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment."

United States v. St. Paul, B. & M. R. Co., 247 U. S. 310, 38 Sup. Ct. Rep. 525.

Notwithstanding the plain language of the exemption expressed by Section 402(c), the Interstate Commerce Commission erroneously construed and restricted the meaning of this statute to exclude from the exemption benefits realized by members of the Association through consolidation of shipments of goods purchased by them on a delivered price or f.o.b. destination basis. In so doing, the Commission apparently followed through on its initial error of concluding that the service of the Association in connection with such shipments was rendered to and for the benefit of the non-member consignors rather than the member consignees.

As pointed out by the court below:

"When this member-agent relationship between member-purchaser and the Association is borne in mind, it is clear that there is no profit to the Association from the activities described in the Commission's Report." (49 U. S. C. Sec. 1002(e).)

Under the general rules of law applicable to sales, title passes as between the parties at the point from or to which shipments of goods are made "f.o.b." unless a contrary intention appears. (*United States v. R. P. Andrews & Co.*, 207 U. S. 229; *Com. v. Wiloil Corp.*, 316 Pa. 33, *affirmed in* 294 U. S. 169.) In the present proceeding, and regardless of whether the goods were purchased f.o.b. destination or on a delivered price basis, the member-consignee ordered deliveries to be made to their agent (the Association) at Chicago. Having accepted delivery at that

Affidavit of Service by Mail.

State of California, County of Los Angeles—ss.

DeEtta W. Nelson, being first duly sworn, deposes and says:

That affiant is a citizen of the United States and is a resident of the County of Los Angeles; that affiant is over the age of 18 years and is not a party to the within entitled proceeding; that affiant's business address is 241 East Fourth Street, Los Angeles 13, California;

That on the 4th day of January, 1950, affiant served the foregoing Brief on Behalf of Appellees on the Appellants in said proceeding by placing true copies thereof in envelopes addressed to the attorneys of record for said Appellants at the office addresses of said attorneys as follows:

Counsel for Appellant, The United States of America:

Philip B. Perlman, Esq. (3 copies),
Solicitor General of the United States,
Department of Justice,
Washington 25, D. C.

Counsel for Appellant, Interstate Commerce Commission:

Daniel W. Knowlton, Esq. (2 copies),
General Counsel,
Interstate Commerce Commission,
Interstate Commerce Building,
Washington 25, D. C.

Counsel for Appellant, Freight Forwarders' Institute:

Harry C. Ames, Esq. (2 copies),
Ames, Hill and Ames,
Transportation Building,
Washington 6, D. C.

and then by sealing said envelopes and depositing the same by air mail, special delivery, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorneys for the persons by and for whom said service was made.

That there is delivery service by United States mail at the places so addressed and there is a regular communication by mail between the place of mailing and the places so addressed.

DEETTA W. NELSON.

Subscribed and sworn to before me this 4th day of January, 1950.

(Seal) MARGUERITE F. CRIPPS,
Notary Public in and for Said County and State.

My Commission expires Jan. 3, 1952.

point and assumed custody and control over the shipments by causing them to be consolidated in pool cars of the Association, the purchaser *ipso facto* became the owner of the goods. Recognition of this change of ownership when the goods were actually delivered into the possession of the purchaser's agent at Chicago would have unquestionably lead to a different conclusion on the part of the Commission. This is shown by the following statement contained in the Report.

> "The meaning of the word 'profit' varies with its context. Broadly stated, it is the excess of what is obtained over the cost of obtaining it. In the sense that they result in savings to its members, all of the association's operations are for profit. * * * But section 402(c)(1) specifically sanctions an association's obtaining for its members 'the benefits (savings) of carload * * * rates'; and if the association's operations were confined to obtaining for its members the benefits of carload rates on their own freight, such operations would appear to be excluded from the concept of profit as the word 'non-profit' is used in that section." [R. 32.]

Retention by the members of savings realized from the consolidation of shipments of goods purchased f.o.b. destination or on a delivered price basis did not transgress the non-profit clause of section 402(c). The saving so retained was in reality from their own expenditure. When non-member consignors prepaid freight or made freight allowances, they did so because of the requirements of the sale contracts under which the goods were sold to the member consignees. The obligation on the part of the sellers to pay (or allow) freight charges became fixed credits of the member-purchasers when the sale agreements were consummated. These credits to which the members

were entitled could be claimed by them in connection with any shipment regardless of the mechanics of transportation procedure used in making the shipment; irrespective of whether shipment moved "freight collect" or "prepaid" or subject to "freight allowance," the member consignee was entitled to cash or credit representing the amount determined by the sale agreement as the freight allowance.

In the case of collect shipments, freight charges were paid from money advanced by the member-consignee. On prepaid shipments the money was (advanced) by the non-member consignor to the Association and credit given therefor by the Association to the member consignee, but this payment by the non-member consignor was made pursuant to instructions given to the consignor by the member consignee. These instructions were followed by the consignor because the terms of the sale contract provided for a freight allowance (or prepayment) to be made by the seller. It was in every case one of the considerations moving from the seller to obtain the business and was reflected in the price which the consignee member was required to pay. In brief, the payment by the non-member consignor came out of the pocket of the member consignee as surely as if the latter had made it himself.

We respectfully submit that the Commission erred in its conclusion that the member-consignees realized a profit when they received the savings paid out of freight allowances. Within the concept of the non-profit clause of section 402(c) one does not make a profit when he gets back his own money.

III.

The Commission's Findings Do Not Support the Conclusion That the Association Holds Itself Out to the General Public to Transport or Provide Transportation of Property for Compensation, Within the Meaning of Section 402(a)(5) of the Interstate Commerce Act.

This conclusion is obviously related to the definition of the term "freight forwarder" stated in Section 402(a)(5) as follows:

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II or III of this Act." (Emphasis supplied.)

To constitute one a "freight forwarder" within the meaning of the foregoing definition, four essential elements are required. The first and most important is that there must be a holding out to the general public to transport or provide transportation for compensation. In other

words, the activities must be essentially those of a common carrier.

The law is well settled that certain essential characteristics must be established before common carrier status is proved. Corpus Juris Secundum furnishes a clear statement on this subject, supported by a great number of decisions.

> "A common carrier of goods has been defined as one who, by virtue of his calling, and as a regular business, undertakes to transport goods from place to place, offering his services to such as may choose to employ him and pay his charges, and without regard to distance or motive power. * * *
>
> "The test by which it is determined whether a party is a common carrier of goods is: (1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry by the methods by which his business is conducted, and over his established roads. (4) The transportation must be for hire. The distinctive characteristics of a common carrier are those stated in the first test set out above, viz: That he holds himself out as ready to engage in the transportation of goods for hire as a public employment, and not as a casual occupation, and that he undertakes to carry for all persons indifferently, within the limits of his capacity and the sphere of the business required of him, so that he is bound to serve all who apply, and is liable for refusal, without sufficient reason, to do so.

"In general, the liability of carrier does not attach to one that does not hold itself out as pursuing that business, but in the particular case, and in each particular case acts only in consequence of a special employment. The law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have neither expressly assumed that character nor by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it. * * *" (13 C. J. S. pp. 125-28.)

It remains to be determined whether the operations of the Association as revealed by the facts reflected in the Commission's findings bring it within the scope of the definition of a freight forwarder. These facts may be briefly summarized as follows:

(a) The Association engaged solely in consolidating, forwarding, distributing and accounting for shipments of property purchased by and destined to its members. It did not avertise its services nor invite the public to use them, and has consistently refused to accept shipments for consolidation, not purchased by its members.

(b) The Association acted only on specific instructions given by its members, and the non-member sellers consigned shipments to the Association for consolidation only because instructed to do so by the members.

(c) The Association earned no profits and declared no dividends. The entire cost of the operation was apportioned to and borne by the members. The only funds handled by the Association were those made

available to it by its members, as "advances," and the Association acted as the managing and disbursing agent for the members, using these funds to pay the actual costs of operation and refunding the unspent balance to the member or members who advanced it.

Such operations, we submit, were not held out to the public. The Association was not engaged in the business of consolidating and distributing freight as a public undertaking. It neither served nor offered to serve anyone other than its members and all of the benefits derived from its operations were enjoyed exclusively by the members.[1]

The conclusion expressed by the Commission "that the association's service is held out to and performed for the general public," rests upon the assumed correctness of the prior conclusion that, with respect to shipments of goods sold on a delivered price or f.o.b. destination basis, the Association "serves" the non-member consignor rather than the member consignee. This conclusion in turn is based entirely upon the reasoning applied in reparation

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[1]Transportation service rendered to a cooperative association, its stockholders or members, has been generally held to be not that of a common carrier; the reason being that such service does not constitute a "holding out" to serve the general public.

Davis v. People (1926), 79 Colo. 642, 247 Pac. 801;

Parlett Cooperative v. Tidewater Lines (1933), 164 Md. 405, 165 Atl. 313;

Hisem v. Guran, 102 Ohio St. 59, 146 N. E. 808;

Public Utilities Com. v. Holdren, 34 Ohio App. 416, 171 N. E. 255;

Dairymen's Coop. Sales Assoc. v. Public Serv. Com., 318 Pa. 381, 177 Atl. 770;

98 A. L. R. 226, annotation.

cases to the effect that when goods are sold f.o.b. destination the consignor pays and bears the charges. The fallacy of these conclusions, as we appraise them, and the inapplicability of the reasoning of reparation cases to this investigation-of-status proceeding has been pointed out and argued in the preceding pages of this petition. Without repeating this argument we desire, respectfully, to direct the Court's attention to what appears to be the true situation.

The record and findings disclose that the Association was created and operated solely for the benefit of its members. It made no arrangements with and was not employed by nonmember consignors to handle *their freight.* It restricted its operations to consolidating and distributing freight "for its members" and distributed all benefits derived from such consolidation to its members. It was not engaged in the business of consolidating goods for others as a public employment and even the inclusion of the relatively small number of "prepaid" and "freight allowed" shipments was not service "for hire" rendered to the non-member consignors. They did not hire or employ the Association to render this service.

Despite these facts and circumstances, the Commission concluded that the Association received money from and therefor served the non-member consignors, and that in so doing, "holds itself out to the general public" to render a consolidation and distribution service. We respectfully submit that in thus treating freight allowances, bought and paid for by the members in purchasing their goods, as compensation for transportation services rendered to the non-member consignors by the Association for hire, a sacrifice of facts to fiction has been accomplished.

The cases cited by the Commission's Report in support of its conclusion "that the association's services is held out to and performed for the general public," involved facts quite different from those presented in the case at bar, and do not support the conclusion.

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, the first case cited, presented the question whether the taxicab company operating in Washington, D. C., was a common carrier as to all phases of its operations. One part of its business was that of maintaining cabs at the Union Railroad Station where it had a lease to operate a cab stand for the accommodation of persons arriving at the station and seeking transportation to their homes, offices, or other destinations. Another part was that of maintaining cabs at places reserved for them at certain hotels, pursuant to contractual arrangements between the hotels and the taxicab company. These cabs, like those at the railway station, were made available to and used by such members of the general public as wanted a taxicab. The Supreme Court concluded that notwithstanding the contractual right to occupy space reserved for its cabs at the depot and the hotels, the cab company was engaged in the business of rendering taxicab service to such members of the public as might wish to employ them. In this connection Mr. Justice Holmes used the expression quoted in the Commission's report, "no carrier serves all the public." With respect to the remaining portion of the taxicab company's business, consisting mainly of furnishing automobiles upon order, but reserving the right to refuse service, and making individual bargains for each service rendered, the court held that the business was not that of a public utility.

In both of the other cases cited (*Phillips Packing Co., Inc.*, Common Carrier Application, 260 I. C. C. 297, and

Toussaint Contract Carrier Application, 41 M. C. C. 459), the carriers involved were found by the Commission to be engaged *in the business of transportation*, and the service involved to be that of transporting goods sold by certain supply houses to their customers, who paid the carrier for the service thus rendered. But in these cases the supply houses were dealing with the general public in offering their goods for sale to whomsoever might seek to buy them. Obviously, then, a carrier transporting the purchased goods for and receiving his freight charges from the purchaser would be acting as a common carrier serving such members of the general public as saw fit to deal with the supply houses. Such service is similar to that described in *Terminal Taxicab Company v. Kutz*, 241 U. S. 252, wherein a taxicab service was rendered to such members of the public as might patronize the hotels at which the taxicab company had its leased stands.

Under the well settled principles governing the determination of common carrier status, it would appear that the correctness of the decisions in each of the three cases cited by the Commission rests squarely on the fact that there was an offer or holding out on the part of the supply houses or hotels to sell their supplies (or services) to any one of the general public desiring to purchase and willing to pay the seller's price. In absence of such "holding out to the general public," the principal element of common carrier service would be missing.

In the present proceeding the facts are radically different. Here the consignee members of the Association do not deal with the general public when they purchase their supplies from non-member consignors. On the contrary, they select the factories or suppliers with whom they will deal and all of their purchases are the result of individual bargains. By no stretch of the imagination could it be

found upon the facts of record in this case that any factory desiring to sell and ship goods to a member of the respondent association is free to do so. It is one thing to say that a merchant who sells to anyone seeking to buy his goods thereby deals with the public, but it is quite another thing to conclude that a buyer who purchases his supplies from one or more factories, making an individual bargain in each case, thereby deals with the public. We respectfully submit that even though it were assumed for the sake of argument that the association served the non-member consignors in consolidating shipments purchased by its members from such consignors on a delivered price or f.o.b. destination basis, it does not follow and cannot be assumed that such service is held out to and performed for the general public.

Conclusion.

For the reasons herein stated, the conclusions of the Interstate Commerce Commission in its Report R. 269, I. C. C. 504 [R. 23], are not supported by the findings of fact contained in said report, and the decree of the court below should be affirmed.

Respectfully submitted,

HUGH GORDON,
WYMAN C. KNAPP,
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January 3, 1950.